

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Joint Petition for Forbearance From the)	
Current Pricing Rules for the Unbundled)	WC Docket No. 03-189
Network Platform)	
)	
Petition for Forbearance From)	
the Current Pricing Rules for)	WC Docket No. 03-157
the Unbundled Network Element Platform)	

REPLY OF JOINT PETITIONERS

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Date: October 7, 2003

Reply of Joint Petitioners
WC Docket Nos. 03-189 and 03-157
October 7, 2003

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REPLY OF JOINT PETITIONERS

Qwest Corporation, BellSouth Telecommunications, Inc. and SBC Communications, Inc. ("Joint Petitioners") hereby submit the following Reply to the Comments filed on the Joint Petition requesting that the Commission forbear from applying the Commission's UNE pricing rules to the Unbundled Network Element Platform ("UNE-P").

I. INTRODUCTION AND SUMMARY

On July 31, 2003, the Joint Petitioners requested that the Commission act in accordance with the forbearance authority set forth in Section 10 of the Telecommunications Act,¹ and forbear from (1) applying Total Element Long Run Incremental Cost ("TELRIC") pricing rules to UNE-P and (2) permitting UNE-P carriers to collect per minute access charges. The Joint Petition sought exactly the same forbearance relief that the Verizon Telephone Companies requested on July 1, 2003.²

¹ 47 U.S.C. § 160.

² *In the Matter of Petition of the Verizon Telephone Companies for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform*, WC Docket No. 03-157, Petition for Expedited Forbearance of the Verizon Telephone Companies (filed July 1, 2003),

The Joint Petition demonstrated that the grounds for relief sought by the Joint Petitioners were essentially identical to those advanced in the Verizon Petition.³ Accompanying the Verizon Petition were data and analyses that established that the dramatic decline in investment in the telecommunications industry and the devaluation of the nation's telecommunications infrastructure are due in substantial part to the application of the TELRIC pricing rules to UNE-P. The evidence, much of which was national in nature, showed that the application of TELRIC to UNE-P has produced a system of uneconomic arbitrage by grossly understating ILEC costs while providing huge margins for UNE-P carriers.⁴

While TELRIC, as constituted, is a flawed methodology, the problems with TELRIC are particularly acute when it is applied to UNE-P.⁵ The conditions for forbearance have clearly been met: application of UNE pricing rules to UNE-P is not necessary to insure that charges are just and reasonable and are not unreasonably discriminatory; enforcement of UNE pricing rules for UNE-P is not necessary to protect consumers; and forbearance is consistent with

modified by Letter from Karen Zacharia, Vice President and General Counsel, Verizon to Marlene H. Dortch, Secretary, FCC (July 23, 2003) (collectively "Verizon Petition").

³ A copy of the Verizon Petition was attached to the Joint Petition as Attachment A.

⁴ In addition, the Joint Petitioners submitted data specific to their respective companies that validated the reasoning set forth in the Verizon Petition. Both Qwest and SBC provided data in comments filed on the Verizon Petition. The comments and reply comments of Qwest and SBC are incorporated by reference. BellSouth made a supplemental submission in this proceeding on August 15, 2003.

⁵ In their petition, the Joint Petitioners strongly supported the Commission's initiative to review TELRIC pricing rules. On September 15, 2003, the Commission released a Notice of Proposed Rulemaking that commences the TELRIC pricing review. Some commenters suggest that such a rulemaking is the only way in which the Commission can grant the type of relief requested by the Joint Petitioners and that forbearance is procedurally improper. As discussed *infra*, the statute contemplates forbearance as a mechanism to remedy the circumstance where application of a rule is not in the public interest.

the public interest. In these circumstances, the statute directs the Commission to exercise its forbearance authority.

Recognizing the overlap between the Joint Petition and the Verizon Petition, the Commission, in its Public Notice requesting comments on the Joint Petition, advised interested parties who filed comments on the Verizon Petition that, if they wished to make identical arguments in the instant proceeding, they could incorporate by reference their comments on the Verizon Petition. For the most part, parties have followed this approach by either referring to their already filed comments or attaching them to a brief summary.⁶ Thus, the arguments against the Joint Petition are no different than those that were made against the Verizon Petition. Verizon fully responded to the oppositions to forbearance and submitted a copy of its response in this proceeding. Verizon's responses are both compelling and complete, and accordingly, the Joint Petitioners, rather than restating them here, concur in the Verizon Reply.

While no need exists to republish a rejoinder to each of the issues that were initially raised against the Verizon Petition and now are raised against the Joint Petition, it nevertheless is appropriate to address two procedural objections that continue to be articulated against the forbearance petitions. The first objection is based on the view that forbearance from applying the TELRIC pricing rules to UNE-P constitutes forbearance of a section 251(c) requirement and that such forbearance is therefore precluded by section 10(d). The second objection is predicated on claims that the Commission cannot forbear from applying its UNE pricing rules but rather can

⁶ There are a few parties, such as the Florida Public Service Commission and the Arizona Public Service Commission, who only filed brief comments in this proceeding. The arguments presented in these comments were also raised in connection with the Verizon Petition.

only change such rules through a rulemaking. As discussed below, these objections are without merit.

II. THE JOINT PETITION IS NOT PRECLUDED BY SECTION 10(D) BECAUSE THE JOINT PETITION SEEKS FORBEARANCE WITH RESPECT TO APPLICATION OF UNE PRICING RULES TO UNE-P, NOT SECTION 251(C)

The CLECs erroneously argue that the Joint Petition is precluded by section 10(d) of the Act,⁷ which provides that “the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented.”⁸ This argument reflects a fundamental misinterpretation of the statutory requirements of section 10(d) as well as the relief sought by the Joint Petitioners.

The Joint Petition does *not* request the Commission to exercise its forbearance authority with respect to section 251(c), which imposes a number of specific duties on ILECs (most notably the requirement that ILECs provide network elements to requesting carriers on an unbundled basis). Rather, the Joint Petition seeks forbearance with respect to specific regulations and decisions that the Commission has implemented with respect to UNE-P, namely (1) the current TELRIC pricing rules and (2) the decision permitting UNE-P carriers to collect per-minute access charges from long distance operators.⁹

Moreover, the Joint Petition does not raise any objections with respect to the unbundling obligations arising under section 251(c). Nor does the Joint Petition seek forbearance with respect to the principle of “cost-based” pricing set out in section 252 (which is referred to in

⁷ 47 U.S.C. § 160(d).

⁸ See AT&T Comments at 2; AT&T Verizon Opposition at 22-29; Z-Tel Opposition at 9-13; Z-Tel Verizon Comments at 13-16.

⁹ Joint Petition at 1.

section 251(c)). Instead, the Joint Petitioners' argument focuses on the unique and severe harm arising from the application of specific rules (i.e., TELRIC and the access charge pricing rule) that have been adopted by the Commission and applied to UNE-P. This is an issue that falls squarely outside the provisions of section 251(c) and one with respect to which the Commission clearly may exercise its forbearance authority.

As others have correctly observed,¹⁰ nothing in section 251(c) or elsewhere in the Act¹¹ requires either the application of TELRIC pricing to UNE-P or the imposition of the access charge pricing rule. In fact, both these rules are the result of regulatory decisions taken by the Commission within its discretion. The Supreme Court has found that the Commission adopted the TELRIC rules "within the discretion left to it after eliminating any dependence on a 'rate-of-return or other rate-based proceeding.'"¹² The Court in *Verizon* went on to hold that the Commission's responsibility for just and reasonable rates "leaves [determination of the pricing methodology] largely subject to [the Commission's] discretion."¹³ Similarly, the Commission's decision to allow UNE-P carriers to collect per minute access charges from long distance operators is the result not of a statutory mandate but of a discretionary order of the Commission.¹⁴

¹⁰ Verizon Reply Comments at 28.

¹¹ Section 252(d)(1), which is not immune from the Commission's forbearance authority pursuant to section 10(d), specifies only that UNE prices are to be based on "the cost . . . of providing . . . the network element" and "may include a reasonable profit."

¹² *Verizon Communs. v. FCC*, 535 U.S. 467, 495 (2002).

¹³ *Id.* at 501.

¹⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and*

The CLECs rely on specious reasoning in a futile attempt to contort the plain meaning of section 10(d) by extending its reach to cover the implementing regulations adopted by the Commission under sections 251(c) and 271. Moreover, a careful reading of section 10 reveals a clear intention to circumscribe narrowly the provisions of section 10(d). In particular, 10(d) prohibits the Commission from exercising its forbearance authority with respect to “the requirements of section 251(c) or 271.”¹⁵ This contrasts sharply with the language of section 10(a), which requires the Commission to forbear “from applying *any regulation* or any provision” of the Act if the Commission determines that the requirements of subsections (1)-(3) have been met.¹⁶ In other words, the section 10(d) exception is clearly meant to apply only to the explicit statutory provisions of sections 251(c) and 271, not to any associated regulations. In contrast, the provisions of section 10(a) confer on the Commission broad authority to forbear from the application not only of statutory provisions but also of “any regulation” promulgated under the Act, such as the TELRIC rules or the access charge pricing rule.

In its attempt to stretch the reach of section 10(d), AT&T misconstrues the language of the Commission’s *1998 Biennial Review*¹⁷ to claim that the Commission has concluded that section 10(d) covers both “statutory provisions” and “implementing regulations.”¹⁸ In fact, the

Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 & 95-185, *First Report and Order*, 11 FCC Rcd 15499, 11679-83, ¶¶ 358-65 (1996).

¹⁵ 47 U.S.C. § 160(d).

¹⁶ 47 U.S.C. § 160(a) (emphasis added).

¹⁷ *In the Matter of 1998 Biennial Regulatory Review—Testing New Technology*, CC Docket No. 98-94, *Notice of Inquiry*, 13 FCC Rcd 21879 (1998) (“*Biennial Review*”).

¹⁸ AT&T Verizon Opposition at 23.

Biennial Review reaches no such conclusion. In the *Biennial Review*, the Commission simply confirmed that section 10(d) prohibits an exercise of its forbearance authority with respect to sections 251(c) and 271 until those sections have been fully implemented. The Commission went on to note that it was not *proposing* to forbear from “applying either of these statutory provisions or the regulations implementing those provisions.”¹⁹ Contrary to AT&T’s misleading assertion, the Commission did not determine that section 10(d) covers implementing regulations as well as the statutory provisions of sections 251(c) and 271.

In addition, AT&T mistakenly points to the language of section 252(e)(2)(B)²⁰ to support its argument that the term “requirement” includes the Commission’s implementing regulations.²¹ In fact, that section clearly reflects a legislative intent to *exclude* implementing regulations from the meaning of “requirement” unless such regulations are specifically referred to in the statutory language. Moreover, the *presence* of the reference to “regulations prescribed by the Commission” in section 252(e)(2)(B) makes the *absence* of such a reference in section 10(d) all the more dispositive of a clear Congressional intent to apply narrowly the limitations of section 10(d) to the specific statutory provisions of sections 251(c) and 271.

In its comments, Z-Tel misinterprets the relief sought by the Joint Petition in arguing that the Joint Petitioners (and Verizon) seek forbearance with respect to the cost-based pricing

¹⁹ *Biennial Review*, 13 FCC Rcd at 21896, ¶ 32.

²⁰ Section 252(e)(2)(B) permits a state commission to reject an interconnection agreement “if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251.” 47 U.S.C. § 252(e)(2)(B).

²¹ AT&T Verizon Opposition at 23.

requirements of section 252.²² In support of this erroneous claim, Z-Tel asserts that Verizon (and by implication the Joint Petitioners) are demanding that a resale pricing rule be applied to UNE-P. In fact, the Verizon Petition acknowledges that if forbearance is granted, the Commission “has discretion to define the pricing rules that apply” and cites a resale pricing standard as one *example* of the type of compensation mechanism which “the Commission would be well within its interpretive authority” to impose.²³ As discussed *supra*, Joint Petitioners do *not* seek forbearance with respect to the cost-based pricing principle set out in section 252(d). What the Joint Petition *does* request is that forbearance be exercised with respect to the application of the TELRIC rules to UNE-P.

Accordingly, exercise of the Commission’s forbearance authority is entirely justified and appropriate in the instant proceeding.

III. A RULEMAKING IS NOT NECESSARY TO GRANT FORBEARANCE RELIEF REQUESTED BY JOINT PETITIONERS

Several commenters suggest that the Commission should deny forbearance because of the Commission’s pending TELRIC reform proceeding (WC Docket No. 03-173).²⁴ These commenters misconstrue the nature of the Joint Petitioners’ forbearance request.

Joint Petitioners do not request that the Commission generally forbear from applying the requirement of § 252(d)(2) that prices for UNEs must be based on cost, or that the Commission generally forbear from applying its TELRIC pricing rules (47 C.F.R. § 51.501, *et seq.*) or its rule

²² Z-Tel Opposition at 10; Z-Tel Verizon Opposition at 14.

²³ Verizon Petition at 13.

²⁴ *See, e.g.*, Pace Comments at 3; SAFE-T Comments at iii; Sprint Opposition at 3-4; Z-Tel Opposition at 3.

that carriers who purchase UNEs may collect access charges from long distance carriers (47 C.F.R. § 51.309(b)).²⁵ Nor does the Joint Petition request that the Commission revise the substance of its TELRIC methodology. While Joint Petitioners agree that the substance of the Commission's TELRIC pricing methodology must be revised, such wholesale revision is not the subject of the Joint Petition. That revision, however, should occur as a result of Commission action in the TELRIC reform proceeding.

The Verizon Petition and the Joint Petition showed that the statutory conditions for forbearance have been met with respect to the application of the current rules to UNE-P. Thus, the Verizon Petition and the Joint Petition request forbearance from a specific *application* of those rules—not a modification of those rules. It requests that the Commission forbear from applying TELRIC rules *to UNE-P*. The fact that the Commission has prospective rule changes under consideration does not negate the fact that forbearance is appropriate with respect to the rules currently in effect. In short, commencement of the TELRIC proceeding does not resolve the issues raised by Verizon and Joint Petitioners.²⁶

²⁵ The fact that Verizon or Joint Petitioners did not specifically enumerate those rules is a picayune argument against forbearance. *See* AT&T Verizon Opposition at 12. There should be no doubt as to the rules in question, and rejection based merely on their absence from the Verizon Petition or the Joint Petition would serve only to delay resolution of the substantive issues raised in this proceeding.

²⁶ Conversely, appropriate resolution of the Verizon Petition and the Joint Petition will not remedy the fundamental flaws in the Commission's TELRIC methodology. Even if that methodology is no longer applied to UNE-P, the flaws in the methodology itself will remain, and the market distortions that result from applying the methodology to UNEs and interconnection will continue. Accordingly, the Commission must not delay its TELRIC reform proceeding while it carries out its statutory forbearance mandate in this proceeding.

Contrary to AT&T's belief, granting the forbearance petitions would not result in a rule replacement or a promulgation of a new rule.²⁷ The statutory pricing requirement that UNEs be priced at cost plus profit would continue to apply to discrete UNEs. As the Verizon Petition pointed out, pricing UNE-P, which is the functional equivalent of resale, at the same price as resale arrangements would be an outcome permitted by the statute. Similarly, with respect to access charges, if the Commission forbears from applying 47 C.F.R. § 51.309(b) to UNE-P, the collection of access charges for UNE-P lines would operate in a manner similar to the process governed by 47 C.F.R. § 51.617(b). The Verizon Petition and the Joint Petition are thus proper requests for forbearance, and are not in any sense an end-run around the Administrative Procedure Act or an otherwise improper request for Commission rulemaking.

For the foregoing reasons, the Commission should grant the Joint Petitioners' request for forbearance.

²⁷ AT&T Verizon Opposition at 10-12.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 7th day of October 2003 served the following parties to this action with a copy of the foregoing **REPLY OF JOINT PETITIONERS** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties on the attached service list.

/s/ Juanita H. Lee

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